IN THE

Supreme Court of the United States

OCTOBER TERM, 1939.

No. 544.

JOSEPH F. LOEHR, Mayor, JAMES J. HUSHION, Comptroller and DENNIS M. MORRISSEY, Commissioner of Public Safety of The City of Yonkers, constituting the Board of Trustees of the Firemen's Pension Fund of the City of Yonkers,

Petitioners,

against

WALTER F. DOWNEY, Receiver of The First National Bank and Trust Company of Yonkers, in liquidation.

NOTICE AND MOTION TO SUBSTITUTE PARTIES.

E. J. DIMOCK,
Counsel for Petitioners.

Pandick Press, Inc., 22 Thames St., New York, U. S. A.

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To:

BENJAMIN W. MOORE, Esq.,
30 South Broadway,
Yonkers, New York,
Counsel for Respondent.

Sir:

PLEASE TAKE NOTICE that on the 5th day of February, 1940, or as soon thereafter as counsel can be heard, the within motion to substitute John J. Condon, Mayor, Gustav

W. Klein, Jr., First Deputy and Acting Comptroller, and Raymond J. Whitney, City Manager, acting as Commissioner of Public Safety of the City of Yonkers, constituting the Board of Trustees of the Firemen's Pension Fund of the City of Yonkers, as petitioners herein, as successors to and in the place and stead of Joseph F. Lochr, Mayor, James J. Hushion, Comptroller, and Dennis M. Morrissey, Commissioner of Public Safety, respectively, will be submitted to the Supreme Court of the United States.

A printed copy of the motion to substitute is served upon you herewith.

E. J. Dimock
Counsel for Petitioners.

Due and timely service accepted this 25th day of January, 1940.

Benjamin W. Moore
Counsel for Respondent.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1939.

No. 544.

JOSEPH F. LOEHR, Mayor, JAMES J. HUSHION, Comptroller and DENNIS M. MORRISSEY, Commissioner of Public Safety of The City of Yonkers, constituting the Board of Trustees of the Firemen's Pension Fund of the City of Yonkers,

Petitioners,

against

WALTER F. DOWNEY, Receiver of The First National Bank and Trust Company of Yonkers, in liquidation.

MOTION TO SUBSTITUTE PARTIES.

COME NOW, the petitioners in the above entitled cause, and move that John J. Condon, Mayor of the City of Yonkers, Gustav W. Klein, Jr., First Deputy and Acting Comptroller, and Raymond J. Whitney, City Manager, acting as Commissioner of Public Safety of the City of Yonkers, be substituted as petitioners therein in the place and stead of Joseph F. Loehr, former Mayor of the City of Yonkers, James J. Hushion, former Comptroller of the City of Yonkers, and Dennis M. Morrissey, former Commissioner of

Public Safety of the City of Yonkers, and in support of this motion make the following brief statement of the matter involved, and the reasons relied upon for the substitution:

I.

This application is made under and pursuant to Section 780 of Title 28 U. S. C. (§11, 43 Stat. 941; Feb. 13, 1925).

II.

On November 20, 1939, Joseph F. Loehr, Mayor, James J. Hushion, Comptroller, and Dennis M. Morrissey, Commissioner of Public Safety of the City of Yonkers, constituting the Board of Trustees of the Firemen's Pension Fund of the City of Yonkers, filed in this Court their petition for certiorari to review the judgment of the Circuit Court of Appeals for the Second Circuit, entered on August 22, 1939. On December 18, 1939, this Court granted certiorari (84 L. ed. 250).

III.

The Firemen's Pension Fund of the City of Yonkers is created and its administration provided for by Local Law No. 2—1931 of the City of Yonkers, which provides, so far as is material to this motion, as follows:

"CITY OF YONKERS

LOCAL LAW No. 2—(1931)

A local law of the City of Yonkers to amend and supersede Article XII, Firemen's Pension Fund of the Supplemental Charter of said city, contained

in Chapter 452 of the Laws of 1908, as amended, entitled 'An Act to Supplement the General Laws Relating to the Government of the City of Yonkers, and to Revise and Consolidate the Local Laws Relating Thereto'.

Be it enacted by the Common Council of the City of Yonkers as follows:

Section 1. Article XII, Firemen's Pension Fund of the Supplemental Charter of the City of Yonkers, N. Y., being part of Chapter 452 of the Laws of 1908 as amended entitled 'An act to supplement the general laws relating to the government of the City of Yonkers, and to revise and consolidate the local laws relating thereto,' is hereby amended and superseded to read as follows:

Section 1. The Mayor, the Comptroller and the Commissioner of Public Safety and their successors in office, shall constitute a board of trustees of the Firemen's Pension Fund; and they shall have the care, control, management and distribution of said funds as provided by law. The Comptroller shall be the custodian of the said fund, and the City Treasurer shall be the treasurer thereof."

The entire Local Law is set forth in the transcript of record heretofore filed herein on pages 108 to 116, inclusive.

IV.

On December 31, 1939, the terms of office of Joseph F. Loehr, as Mayor of the City of Yonkers, and Dennis M. Morrissey, as Commissioner of Public Safety of the City of Yonkers, expired, and on January 20, 1940, James J. Hushion retired from the office of Comptroller of the City of Yonkers.

V.

On January 2, 1940 John J. Condon succeeded said Joseph F. Loehr, as Mayor of the City of Yonkers, having on that date been duly chosen for such office by the Common Council of said City of Yonkers acting under the authority of the following provisions of Section 5 of Article XV of the Supplemental Charter of the City of Yonkers (Chap. 452, Laws of New York, 1908, as amended by a Local Law duly adopted by the Electors of the City of Yonkers at a general election held in said City on November 8, 1938):

> "Section 5. MAYOR. The elective offices of the city other than the offices of councilman, supervisor, two city judges and four justices of the peace, are hereby abolished. The common council elected in 1939 and each newly elected common council thereafter shall at its first meeting choose one of its members as presiding officer, who shall have the title of mayor."
>
> "* * *"

VI.

On January 2, 1940, Raymond J. Whitney was duly appointed City Manager of the City of Yonkers by the Common Council of the City of Yonkers, pursuant to authority duly vested in them, and on January 3, 1940 assumed the duties of his office as City Manager. In and by the Charter of the City of Yonkers (Chap. 452, Laws of N. Y. 1908, as amended by a Local Law duly adopted by the Electors of the City of Yonkers at a general election held in said City on November 8, 1938), it is provided, among other things, as follows:

"ARTICLE XVI.

THE CITY MANAGER.

"Section 1. *Existing Departments of the City.* The existing departments, divisions and boards of the city government are continued unless changed by the provisions of this amendment. Except as in this amendment otherwise provided, the common council shall have and possess all the powers of and shall either perform or supervise and provide for the performance of all the duties heretofore imposed upon the common council, the various city departments, city boards and commissions, the heads of city departments and all other officers of the city whether elective or appointive. Except as established by the provisions of this amendment, the common council may change, increase, reduce, abolish, combine, and rearrange the departments, divisions and boards of the city government.

"Section 2. *City Manager.* The common council shall appoint a city manager, who shall be the chief executive and administrative officer of the city. The city manager shall be chosen by the common council solely on the basis of his executive and administrative qualifications with special reference to his actual experience in or knowledge of accepted practice in respect to the duties of his office as hereinafter outlined. No persons elected to the common council shall be chosen as city manager during the term for which he was elected.

"• • •

"Section 4. *Responsibility of Managers—Powers of Appointment and Removal.* The city manager shall be responsible to the common council for the proper administration of all the affairs of the city

placed in his charge, and to that end, subject to any existing provisions as to term of office, conditions of removal, or compensation, as may be imposed by state law, shall have the power to appoint and remove all heads of departments including the comptroller and other officers and employes in the administrative service of the city and to fix their salaries subject to any limitation which the common council may impose; but the manager may authorize the head of a department or office responsible to him to appoint and remove subordinates in such department or office. The city manager himself may act as head of a department when in his judgment the appointment of another person to such office is not necessary. Appointments made by, or under the authority of, city manager shall be on the basis of executive and administrative ability and of the training and experience of such appointees in the work which they are to perform. All such appointments shall be without definite term, unless for provisional, temporary or emergency service.

"Every administrative officer or employee who is in office at the time this amendment takes effect shall continue in office until the city manager or other person duly authorized by the city manager shall appoint a successor to such administrative officer or employee unless such administrative office or position be abolished by the common council and except that in the case of death or incapacity of the incumbent or of his refusal to act, the common council may fill such vacancy by temporary appointment."

VII.

The Comptroller is the head of the Department of Finance (Article III-A §1, Charter of the City of Yonkers, Chap. 452, Laws of N. Y. 1908, as amended by Chap. 667,

Laws of 1933). The Commissioner of Public Safety is the head of the Department of Public Safety (N. Y. Second Class Cities Law §130).

VIII.

On January 22, 1940, pursuant to authority vested in him by Section 4 of Article XVI of the Charter of the City of Yonkers, *supra*, Raymond J. Whitney, City Manager, designated Gustav W. Klein, Jr., First Deputy Comptroller, as Acting Comptroller of the City of Yonkers. Gustav W. Klein, Jr. as First Deputy and Acting Comptroller, has assumed and is now performing all of the duties and exercising all of the powers of Comptroller, and is the successor in office of James J. Hushion, former Comptroller.

IX.

On January 3, 1940, pursuant to the authority duly vested in him by Section 4 of Article XVI of the Charter of the City of Yonkers, *sup.* , Raymond J. Whitney, City Manager, duly made it known that in his judgment it was unnecessary to appoint another person to the office of Commissioner of Public Safety of the City of Yonkers and has, since January 3, 1940, acted as Commissioner of Public Safety of the City of Yonkers and as such is the successor in office to said Dennis M. Morrissey, former Commissioner of Public Safety of the City of Yonkers.

X.

There is a substantial need for continuing and maintaining this cause and obtaining an adjudication of the questions involved therein. From Local Law No. 2-(1931) heretofore set forth in full in paragraph numbered III, it appears that the persons who constitute the Board of Trustees of the Firemen's Pension Fund of the City of Yonkers are so constituted by reason of the office which they hold in the municipal government of the City of Yonkers. The individuals constituting such Board of Trustees have no personal interest in the fund which is held for the benefit of the firemen of the City of Yonkers. The termination of the terms of office of Joseph F. Loehr as Mayor, James J. Hushion, as Comptroller and Dennis M. Morrissey as Commissioner of Public Safety in no way renders the issues involved in this cause academic, and has in no way relieved the necessity for a decision by this Court upon the issues involved therein.

XI.

The said John J. Condon, Gustav W. Klein, Jr., and Raymond J. Whitney have been advised of the making of this motion and have consented thereto, as appears from their written consent attached hereto as Exhibit A.

XII.

The said Joseph F. Loehr, James J. Hushion and Dennis M. Morrissey have been advised of the making of this motion and have consented to the substitution of said John

J. Condon, Gustav W. Klein, Jr., and Raymond J. Whitney in their place and stead as prayed for herein, as appears from their written consent attached hereto as Exhibit B.

XIII.

Less than six months have expired since the terms of office of said Joseph F. Loehr and Dennis M. Morrissey expired and since said James J. Hushion retired, and there is no provision in the law of the State of New York limiting the time within which the application may be made.

WHEREFORE, petitioners pray that John J. Condon, Mayor of the City of Yonkers, Gustav W. Klein, Jr., First Deputy and Acting Comptroller, and Raymond J. Whitney, City Manager, acting as Commissioner of Public Safety of the City of Yonkers now constituting the Board of Trustees of the Firemen's Pension Fund of the City of Yonkers, be substituted herein as petitioners in the place and stead of Joseph F. Loehr, former Mayor of the City of Yonkers, James J. Hushion, former Comptroller of the City of Yonkers, and Dennis M. Morrissey, former Commissioner of Public Safety of the City of Yonkers; that John J. Condon, Mayor, Gustav W. Klein, Jr., First Deputy and Acting Comptroller, and Raymond J. Whitney, City Manager acting as Commissioner of Public Safety of the City of Yonkers, constituting the Board of Trustees of the Firemen's Pension Fund of the City of Yonkers, be permitted to continue and maintain this cause; and that the title of the cause be amended to read:

"JOHN J. CONDON, Mayor, GUSTAV W. KLEIN, JR., First Deputy and Acting Comptroller and RAYMOND

J. WHITNEY, City Manager, acting as Commissioner of Public Safety of the City of Yonkers, constituting the Board of Trustees of the Firemen's Pension Fund of the City of Yonkers, Petitioners, against WALTER F. DOWNEY, Receiver of The First National Bank and Trust Company of Yonkers, in liquidation."

Respectfully submitted,

E. J. DIMOCK
Counsel for Petitioners.

Dated: January 24, 1940.

Exhibit A.

We, JOHN J. CONDON, Mayor of the City of Yonkers, GUSTAV W. KLEIN, JR., First Deputy and Acting Comptroller of the City of Yonkers, and RAYMOND J. WHITNEY, City Manager acting as Commissioner of Public Safety of the City of Yonkers, constituting the Board of Trustees of the Firemen's Pension Fund of the City of Yonkers, have read the foregoing motion praying that we be substituted in the place and stead of Joseph F. Loehr, former Mayor of the City of Yonkers, James J. Hushion, former Comptroller of the City of Yonkers, and Dennis M. Morrissey, former Commissioner of Public Safety of the City of Yonkers, in the said cause now pending before the Supreme Court of the United States, and we hereby consent to the continuance of said cause and to be substituted as petitioners therein.

Dated: Yonkers, New York, January 23, 1940.

JOHN J. CONDON
Mayor of the City of Yonkers.

GUSTAV W. KLEIN, JR.
First Deputy and Acting Comptroller of the City of Yonkers.

RAYMOND J. WHITNEY
City Manager of the City of Yonkers acting as Commissioner of Public Safety.

STATE OF NEW YORK
COUNTY OF WESTCHESTER } ss.:

On this 23 day of January, 1940, before me came JOHN J. CONDON, Mayor of the City of Yonkers, to me known and known to me to be the individual described in and who executed the foregoing instrument, and he acknowledged to me that he executed the same.

ALLEN R. HENDERSON
Notary Public Westchester County
Com. expires March 30, 1941

(NOTARIAL SEAL)

STATE OF NEW YORK
COUNTY OF WESTCHESTER } ss.:

On this 23 day of January, 1940, before me came GUSTAV W. KLEIN, JR., First Deputy and Acting Comptroller of the City of Yonkers, to me known and known to me to be the individual described in and who executed the foregoing instrument, and he acknowledged to me that he executed the same.

ALLEN R. HENDERSON
Notary Public Westchester County
Com. expires March 30, 1941

(NOTARIAL SEAL)

STATE OF NEW YORK
COUNTY OF WESTCHESTER } ss.:

On this 23 day of January, 1940, before me came RAYMOND J. WHITNEY, City Manager, acting as Commissioner of Public Safety of the City of Yonkers, to me known and known to me to be the individual described in and who executed the foregoing instrument, and he acknowledged to me that the executed the same.

ALLEN R. HENDERSON
Notary Public Westchester County
Com. expires March 30, 1941

(NOTARIAL SEAL)

Exhibit B.

We, JOSEPH F. LOEHR, former Mayor of the City of Yonkers, JAMES J. HUSHION, former Comptroller of the City of Yonkers, and DENNIS M. MORRISSEY, former Commissioner of Public Safety of the City of Yonkers, have read the foregoing motion praying that John J. Condon, now Mayor of the City of Yonkers, Gustav W. Klein, Jr., now First Deputy and Acting Comptroller of the City of Yonkers, and Raymond J. Whitney, now City Manager, acting as Commissioner of Public Safety of the City of Yonkers, be substituted respectively in our place and stead in the above entitled cause now pending before the Supreme Court of the United States, and we hereby consent to such substitution and to the continuance of the said cause by the said John J. Condon, Mayor, Gustav W. Klein, Jr., First Deputy and Acting Comptroller and Raymond J. Whitney, City Manager, acting as Commissioner of Public Safety of the City of Yonkers, constituting the Board of Trustees of the Firemen's Pension Fund of the City of Yonkers.

Dated: Yonkers, New York, January 24, 1940.

JOSEPH F. LOEHR

JAMES E. HUSHION

DENIS M. MORRISSEY

STATE OF NEW YORK,
COUNTY OF WESTCHESTER, } ss.:

On this 24 day of January, 1940, before me personally came JOSEPH F. LOEHR, former Mayor of the City of Yonkers, to me known and known to me to be the individual described in and who executed the foregoing instrument, and he acknowledged to me that he executed the same.

ALLEN R. HENDERSON
Notary Public Westchester County
Com. expires March 30, 1941

(NOTARIAL SEAL)

STATE OF NEW YORK
COUNTY OF WESTCHESTER } ss.:

On this 23 day of January, 1940, before me came JAMES J. HUSHION, former Comptroller of the City of Yonkers, to me known and known to me to be the individual described in and who executed the foregoing instrument, and he acknowledged to me that he executed the same.

ALLEN R. HENDERSON
Notary Public Westchester County
Com. expires March 30, 1941

(NOTARIAL SEAL)

STATE OF NEW YORK,
COUNTY OF WESTCHESTER, } ss.:

On this 24 day of January, 1940, before me personally came DENNIS M. MORRISSEY, former Commissioner of Public Safety of the City of Yonkers, to me known and known to me to be the individual described in and who executed the foregoing instrument, and he acknowledged to me that he executed the same.

ALLEN R. HENDERSON
Notary Public Westchester County
Com. expires March 30, 1941

(NOTARIAL SEAL)

SUPREME COURT OF THE UNITED STATES.

Nos. 542, 543, 544 and 545.—October Term, 1939.

The City of Yonkers, Petitioner,
542 *vs.*
Walter F. Downey, Receiver of The First National Bank and Trust Company of Yonkers, In Liquidation.

John J. Condon, Mayor, Gustav W. Klein, Jr., First Deputy and Acting Comptroller, and Raymond J. Whitney, City Manager, etc., Petitioners,
543 *vs.*
Walter F. Downey, Receiver of The First National Bank and Trust Company of Yonkers, In Liquidation.

John J. Condon, Mayor, Gustav W. Klein, Jr., First Deputy and Acting Comptroller, and Raymond J. Whitney, City Manager, etc., Petitioners,
544 *vs.*
Walter F. Downey, Receiver of The First National Bank and Trust Company of Yonkers, In Liquidation.

The City of Yonkers, as Trustee under the Last Will and Testament of Irvin Saunders, of "The Saunders Trade School Fund", Petitioner,
545 *vs.*
Walter F. Downey, as Receiver of The First National Bank and Trust Company of Yonkers, New York.

On Writs of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[April 22, 1940.]

Mr. Justice McReynolds delivered the opinion of the Court.

By these companion suits, begun during 1936, the Receiver of The First National Bank and Trust Company of Yonkers ("The Bank"), seeks to recover fifty per centum of deposits withdrawn by petitioners from the association while insolvent. Thus, it is said, they obtained unlawful preferences within the meaning of the

National Banking Act.[1] From corporate assets, general creditors have been paid dividends amounting to fifty per centum of their claims—forty, December, 1933; ten, November, 1937.

The Bank was located in New York. In each cause the points of law and fact are substantially alike. It will suffice to consider them as presented by the Record in No. 542.

Petitioner's deposits with The Bank, March 4, 1933, amounted to $277,000. To secure this and other smaller public ones, bonds of the association totalling $535,000 were in pledge.

The Governor of New York proclaimed Saturday, March 4th and Monday, March 6th, 1933, bank holidays. Later the President and the Governor extended such holidays through March 9th. The Bank was not opened for unrestricted business after March 3rd. A Conservator, appointed March 20th, remained in control until January 23, 1934, when a Receiver took charge.

Between March 9th and 20th, 1933, petitioner withdrew deposits amounting to $89,000; between March 20th and 28th, $67,000. On the latter day, under direction of the Conservator, petitioner's remaining deposits were paid and The Bank retook the pledged bonds.

A jury having been waived the cause was tried to the court upon pleadings and evidence. Among other things it found—

The pledge of assets by The Bank to secure the deposits was *ultra vires* and unlawful.

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[1] Title 12 U. S. C. A.—

Sec. 91. All transfers of the notes, bonds, bills of exchange, or other evidences of debt owing to any national banking association, or of deposits to its credit; all assignments of mortgages, sureties on real estate, or of judgments or decrees in its favor; all deposits of money, bullion, or other valuable thing for its use, or for the use of any of its shareholders or creditors; and all payments of money to either, made after the commission of an act of insolvency, or in contemplation thereof, made with a view to prevent the application of its assets in the manner prescribed by this chapter, or with a view to the preference of one creditor to another, except in payment of its circulating notes, shall be utterly null and void; and no attachment, injunction or execution, shall be issued against such association or its property before final judgment in any suit, action, or proceeding, in any State, county, or municipal court. (R. S. § 5242.)

Sec. 194. From time to time, after full provision has been first made for refunding to the United States any deficiency in redeeming the notes of such association, the comptroller shall make a ratable dividend of the money so paid over to him by such receiver on all such claims as may have been proved to his satisfaction or adjudicated in a court of competent jurisdiction, and, as the proceeds of the assets of such association are paid over to him, shall make further dividends on all claims previously proved or adjudicated; and the remainder of the proceeds, if any, shall be paid over to the shareholders of such association, or their legal representatives, in proportion to the stock by them respectively held. (R. S. § 5236.)

The Bank was insolvent March 6th, 1933, and as of that day the rights of creditors became fixed.

The payments of deposits to petitioner were not allowed by any Presidential Proclamation or Executive Order. They were made voluntarily under mistake of law by an officer of the United States and are recoverable. Also they were made with intent to give petitioner preference over other creditors.

No statute of New York confers upon state banks general power to pledge assets to secure deposits. They have no such power under the common law of New York.

Judgment went for the Receiver for fifty per centum of the amounts withdrawn by the petitioner after March 9, 1933, with interest, etc.

The Circuit Court of Appeals affirmed this action. It held all withdrawals after March 9th occurred when the facts indicated The Bank would be unable to pay depositors in due course and that adequate evidence supported the trial court's finding of an intent to prefer. We find no reason to disregard these findings by two courts and accept them as correct.

The Circuit Court of Appeals further held national banks have no implied power to pledge assets to secure deposits; that here The Bank was not empowered so to do by the Act June 25, 1930[2]; that

[2] Act June 25, 1930, c. 604, 46 Stat. 809; 12 U. S. C. A., sec. 90—

All national banking associations, designated for that purpose by the Secretary of the Treasury, shall be depositaries of public money, under such regulations as may be prescribed by the Secretary; and they may also be employed as financial agents of the Government; and they shall perform all such reasonable duties, as depositaries of public money and financial agents of the Government, as may be required of them. The Secretary of the Treasury shall require the associations thus designated to give satisfactory security, by the deposit of United States bonds and otherwise, for the safekeeping and prompt payment of the public money deposited with them, and for the faithful performance of their duties as financial agents of the Government: *Provided*, That the Secretary shall, on or before the 1st of January of each year, make a public statement of the securities required during that year for such deposits. And every association so designated as receiver or depositary of the public money shall take and receive at par all of the national currency bills, by whatever association issued, which have been paid into the Government for internal revenue, or for loans or stocks: *Provided*, That the Secretary of the Treasury shall distribute the deposits herein provided for, as far as practicable, equitably between the different States and sections.

Any association may, upon the deposit with it of public money of a State or any political subdivision thereof, give security for the safekeeping and prompt payment of the money so deposited, of the same kind as is authorized by the law of the State in which such association is located in the case of other banking institutions in the State.

the pledge might be rescinded without return by the Receiver of the sums withdrawn. With these conclusions we agree.

Unless empowered by the Act June 25, 1930 or concerning federal funds (not here claimed) as in *Inland Waterways Corp.* v. *Frederick J. Young, Receiver* (March 25, 1940), national banks may not secure deposits by pledge of assets.

Texas & Pacific Ry. v. *Potforff*, 291 U. S. 245, 253-255, and *Marion* v. *Sneeden*, 291 U. S. 262, authoritatively interpreted the National Banking Act and approved the view that under this, a national bank possesses no inherent power to secure deposits, public or private, by pledging assets, and that such a pledge is both *ultra vires* and contrary to public policy. "The measure of their powers is the statutory grant; and powers not conferred by Congress are denied." Also, that in case of insolvency, assets so pledged, may be reclaimed without payment of the deposits. "To permit the pledge would be inconsistent with many provisions of the National Banking Act which are designed to ensure, in case of disaster, uniformity in the treatment of depositors and a ratable distribution of assets." The results in these causes was not influenced by consideration of local law.

We cannot accept the suggestion of counsel for petitioner that the cited opinions merely declare a pledge of assets *ultra vires* and leave the consequences to be determined by the law of the state where it occurs. This view is not in harmony with the language of the opinions nor with the general purposes of the National Banking Act there pointed out.

Under the common law as interpreted in New York, pledge of securities by a state bank to secure deposits is "contrary to law and beyond the power and authority vested in the officers." Although forbidden, such a pledge will not be set aside unless deposits made in reliance upon it are first repaid. *State Bank of Commerce* v. *Stone*, 261 N. Y. 175, 187-188; *City of Mount Vernon* v. *Mount Vernon Trust Co.*, 270 N. Y. 400, 406.

The Act of June 25, 1930 permits national banks to give security for public deposits "of the same kind as is authorized by the law of the State in which such association is located in the case of other banking institutions in the State." Counsel maintain that within the fair intendment of this, state banks in New York are "authorized" to pledge bonds to secure public deposits. They rely upon the rulings of the local courts, in the causes last cited, concerning

conditions which must be met before an *ultra vires* act will be set aside.

They submit that corporations have capacity to accept the result of their actions. "That the capacity to accept the consequences of an *ultra vires* act is itself a power." Further, that "'giving' a power is but another word for 'authorizing' its exercise." Hence, the argument seems to run, as a state bank may hold the fruit of a pledge until return of the thing pledged, therefore, it is "authorized by law" to make a pledge thus conditioned.

In this procession, obviously, different meanings are attributed to the word "power" and it is confused with "capacity" and "authority." In one sense, every corporation has "power" to do wrong, also "capacity" to suffer the consequences of wrong-doing. But no corporation has authority to violate an inhibition or go beyond the limits of its charter. Authorization to do a forbidden thing cannot be inferred from capacity to accept the prescribed consequences. The law forbade local institutions to make pledges such as the one here in question.

The challenged judgments must be affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.